THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 149/2017

In the matter between:

OMEGA RISK SOLUTIONS (PTY) LTD **APPELLANT**

and

JOSIAS ALEXANDER DE WITT **RESPONDENT**

Neutral citation: *Omega Risk Solutions (Pty) Ltd v De Witt* (149/2017) [2017] ZASCA 171 (1 December 2017)

Coram: Navsa ADP and Majiedt, Willis and Swain JJA and Lamont AJA

Heard: 20 November 2017

Delivered: 1 December 2017

Summary: Prescription Act 68 of 1969 – s 12(3) – identity of debtor and facts from which debt arose – objective standard of reasonable care – statutory attribution of knowledge to creditor – claims prescribed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J, sitting as court of first instance):

'The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.'

JUDGMENT

Swain JA (Navsa ADP, Majiedt and Willis JJA and Lamont AJA concurring):

[1] The issue in this appeal is whether several claims advanced by the appellant, Omega Risk Solutions (Pty) Ltd, against the respondent, Mr Josias Alexander De Witt, have in terms of ss 12(1) and 12(3) of the Prescription Act 68 of 1969 (the Act) become prescribed. It was accepted by the parties, whether knowledge of these claims held by Mr Philippus Smit, an employee of the appellant, should be attributed to the appellant, determines the outcome of the appeal.

[2] The claims were advanced by the appellant against the respondent, in the Gauteng Division of the High Court (Fabricius J), based upon a series of payments made by the appellant during the period March 2007 to August 2010, at a time when the respondent was the Chief Executive Officer of the Omega Group. Certain of the claims alleged that the respondent, in breach of his fiduciary duty to the appellant, authorised payment to named individuals, when to the knowledge of the respondent the appellant was not liable to make payment. Other claims alleged that the respondent authorised payment to named individuals, but then fraudulently and in breach of his fiduciary duty to the appellant, misappropriated these payments for

personal purposes. A further claim alleged that the respondent authorised payment of an amount to a company to discharge a personal liability and thereby committed theft from, and a breach of his fiduciary duty to, the appellant.

[3] In response to these claims, save and except for three payments, the respondent raised a special plea of prescription which was upheld with costs by the court a quo. By agreement, it was dealt with as a preliminary issue in terms of rule 33(4) of the Uniform Rules of Court. The appeal is with the leave of the court a quo.

[4] A resolution of the appeal requires the application of the provisions of ss 12 (1) and (3) of the Act, to the facts. I did not understand counsel for either party to contend otherwise. These sections provide as follows:

'12. **When prescription begins to run**. – (1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) . . .

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[5] It was common cause that the respondent bore the onus of proof in respect of the special plea of prescription. The respondent therefore had to satisfy the requirements of the Act by proving in respect of each claim:

(a) The date of inception of the period of prescription; and

(b) The date on which the appellant, as the creditor, acquired actual knowledge of the identity of the respondent as the debtor, as well as actual knowledge of the facts from which the debt arose, alternatively, the date on which the appellant could, with the exercise of reasonable care, have acquired knowledge of the material facts.

[6] On appeal the appellant accepted:

(a) That the payments made by the appellant as alleged in its claims were common cause and the respondent therefore established the date of inception of the period of prescription in each case;

(b) That Mr Smit, the Group Finance Manager of the Omega group, had gained knowledge of the minimum facts required to institute action (ie the facts from which the debt, claimed by the appellant in each instance, arose) within a period exceeding three years before summons was issued against the respondent.

(c) That the respondent had succeeded in proving the requisite knowledge (of the minimum facts from which the appellant's claims arose) on the part of Mr Smit.

[7] The appellant did not, however, accept that the actual knowledge of Mr Smit could, on the facts of this case, be attributed to the appellant.

[8] In *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC & another* 2010 (3) SA 630 (SCA) para 20, the judgment of Lord Hoffmann in *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500 (PC) at 506B-D, in which the following statement appears, was quoted with approval:

‘Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called "the rules of attribution."’

[9] Section 12(3) of the Act defines the circumstances in which constructive knowledge of the identity of the debtor and the facts from which the debt arose, may be attributed to the creditor. The creditor is deemed to have acquired this knowledge if the creditor could have acquired it by exercising reasonable care. This involves the statutory attribution of knowledge to a creditor, based on the objective criterion of reasonable care, distinct from an enquiry in terms of the rules of attribution. As

stated in *PriceWaterhouseCoopers & others v National Potato Co-operative & another* [2015] 2 All SA 403 (SCA) para 149:

'. . . When prescription is raised against a corporate entity *the ordinary rule of attribution of knowledge to the company of the knowledge of natural persons of the facts giving rise to the claim, is satisfied* if the members of the board of directors have that knowledge, *or could acquire it if they took reasonable care.* It is unnecessary for the purposes of this case to consider whether the knowledge of other persons within the entity would also be attributed to it for the purposes of prescription.' (Emphasis added).

[10] In *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) para 9, the circumstances in which knowledge could be attributed to a creditor, in terms of s 12(3) the Act, were described in the following terms:

'Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. The test is what a reasonable person in his position would have done, meaning that there is an expectation to act reasonably and with the diligence of a reasonable person.'

[11] In *Minister of Finance & another v Gore NO* 2007 (1) SA 111 (SCA) para 16, the policy underlying the Act was described in the following terms:

'The statutory prescription periods are meant to protect defendants from undue delay by litigants who are laggard in enforcing their rights.'

[12] The evidence which was relevant to a determination of whether the board of directors of the appellant, acting reasonably and with the diligence of reasonable persons, could have acquired knowledge of the material facts upon which the claims were based, was as follows:

(a) The appellant formed part of a group of corporate entities described as the 'Omega International Associates', of which the respondent was the Chief Executive Officer. Mr Smit was the Group Finance Manager, which designation was later changed to Group Executive Finance in 2010, and was responsible for financial strategy, policy and procedures. He was known as the person who managed and had the responsibility of supervising the Group's finances. The respondent and Mr

Smit were members of and reported to the Executive Committee of the Omega Group.

(b) Mr Smit supervised the delivery of budgets, had a great deal of input into their formulation and had the important function of ensuring that all audits were done within the group. In addition, he ensured that internal audits were undertaken with regard to each individual entity, as well as cross audits between entities, within the group.

(c) Mr Smit had the responsibility of ensuring, on a monthly basis, that all of the financial statements were consolidated and that management statements were made available to the board of directors of the group. Every company had to have its own financial statements on a monthly basis.

(d) Mr Smit was responsible for overseeing the effective management of the cash flow situation within the group. This included the compilation of weekly and monthly cash flow statements. He was also in charge of ensuring that the expenditure of the group, which included statutory expenditure, was properly accounted for as well as timeously and correctly done.

(e) The appellant was so to speak, the treasury for the entire group and this function was located in the financial division, which Mr Smit controlled.

(f) Mr Smit had oversight over, and was aware of, the payments made to the respondent, which formed the subject matter of the claims as they were made by personnel within the Group's office.

[13] Claims 2 and 4 have to be considered in the context that the appellant conducted operations in the form of risk management by providing security solutions primarily for clients located in parts of Africa and the Middle East. In Gabon, for example, the appellant concluded a macro city centre surveillance contract in terms of which they installed and maintained the surveillance equipment. It installed a control centre which it managed and maintained in support of the government of Gabon and the city of Libreville.

[14] Claim 2 was in respect of the amount of R430 000.00 paid to Mr MJ Khasu, the South African ambassador to Gabon, for assistance he allegedly rendered in respect of this contract which Mr Smit paid at the request of the respondent. According to the respondent, Mr Smit was aware of the reasons for these payments, the work Mr Khasu had supplied and the role he had played in ensuring that the government of Gabon made the payments to the Industrial Development Corporation (IDC) timeously. The government of Gabon did not have funds immediately available to pay for the project and finance was subsequently arranged through the IDC. Mr Smit was fully aware of what the contract entailed as well as the arrangement with Mr Khasu.

[15] As regards claim 4, the respondent admitted these payments were made to Mr Motayo and his consortium as advances in respect of work that he did on various phases of this contract. According to the respondent, everybody was aware of the contract with Mr Motayo and that he was entitled to commission, including Mr Smit. He disputed that Mr Smit was not aware of the reasons for these payments.

[16] Counsel for the appellant conceded that this contract was vital to the economic survival of the appellant, as held by the court a quo. Consequently, when regard is had to the importance of this contract, if the board of directors of the appellant had acted reasonably and with the diligence of reasonable persons, they could have acquired knowledge of claims 2 and 4.

[17] It must be borne in mind that the payments in respect of the claims extended over several auditing periods. These payments must have been included in the annual financial statements for each successive year and would have required the approval of the board of directors. The payments involved large amounts that could not escape attention. The facts are such that it is compellingly arguable that the board of directors in fact knew and authorised the payments. In addition, when regard is had to the functions Mr Smit performed in the financial management of the appellant, it becomes unnecessary to carry out a detailed examination of these claims. He was the Group Finance Manager, managed the cash flow of the Group, had to ensure that the expenditure of the group was properly accounted for and was

a member of and reported to the Executive Committee of the Group. He had to ensure that all financial statements were consolidated on a monthly basis and that management statements were made available to the board of directors of the Group. I agree with the conclusion of the court a quo that Mr Smit was sufficiently close to the Chief Executive Officer of the Group that on the probabilities, the directors possessed knowledge of these claims, or could have acquired it, by the exercise of reasonable care.

[18] I do not agree with the criticism directed by the appellant at this conclusion of the court a quo, describing it as a 'novel proximity test' with the consequence that it thereby avoided the process of attribution of knowledge, at least partially, which as a matter of law it should have applied in order to adjudicate the question of prescription. Although the court a quo referred to the rules of attribution, it is clear that in concluding that '. . . on the probabilities the directors of Plaintiffs had knowledge of the claims relevant in these proceedings, or could have acquired them if they took reasonable care at the time when they ought to have done so', it applied the provisions of s 12(3) of the Act and not the rules of attribution, which it was entitled to do.

[19] In the result the following order is granted:

'The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.'

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	G W Alberts SC (with F J Labuschagne) Instructed by: Booysen, Dreyer & Nolte Inc., Pretoria Honey Attorneys, Bloemfontein
For the Respondent:	M v R Potgieter SC Instructed by: Senekal Simmonds Inc., Bedfordview Phatshoane Henney Attorneys, Bloemfontein